

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1406

IN THE
United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

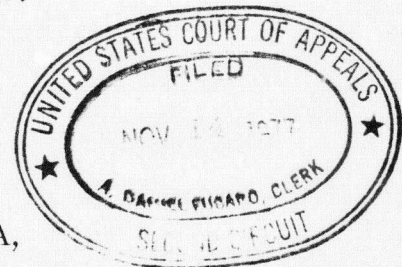
JAMES F. WEDALOWSKI,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK.

APPENDIX

RICHARD J. ARCARA,
United States Attorney,
Western District of New York,
Attorney for Appellant,
502 United States Courthouse,
Buffalo, New York 14202.

JAMES A. FRONK,
Assistant United States Attorney,
of Counsel.



PAGINATION AS IN ORIGINAL COPY

APPENDIX

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Complaint and Affidavit dated June 2, 1975.

United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v

JAMES WEDALOWSKI

Magistrate's Docket No. 75

Case No. 173M

COMPLAINT for VIOLATION of

U.S.C. Title 18

Section 2113(b)

BEFORE Edmund F. Maxwell

Name of Magistrate

414 U.S. Courthouse, Buffalo, N.Y.

Address of Magistrate

The undersigned complainant being duly sworn states:

That on or about June 2, 1975, at 12:58 AM

142,493 > deponent

in the

Western District of New York

(1) JAMES WEDALOWSKI

did⁽²⁾ enter Marine Midland Bank-Western, Military Road Branch, Town of Niagara, New York, with intent to commit in such bank, a burglary on the night safety deposit box and remove monies which were in the care, custody and possession of said bank, deposits of which are insured by the Federal Deposit Insurance Corporation, being the property of said bank, all being in violation of U.S. Code, Title 18, Section 2113(b).

And the complainant states that this complaint is based on the annexed affidavit of your deponent Richard D. Davidson



And the complainant further states that he believes that

are material witnesses in relation to this charge.

Richard D. Davidson Signature of Complainant
Special Agent, FBI

Sworn to before me, and subscribed in my presence, _____, 19____

Edmund F. Maxwell

United States Magistrate

(1) Insert name of accused.

(2) Insert statement of the essential facts constituting the offense charged.

Complaint and Affidavit dated June 2, 1975.

AFFIDAVIT

I, Richard D. Davidson, having been duly sworn,
do depose and say:

I am a Special Agent of the Federal Bureau of Investigation (FBI) assigned to the Buffalo, New York Office. I am completely familiar with all facts pertaining to the burglary of the Marine Midland Bank-Western, Military Road Branch, Town of Niagara, New York.

On June 2, 1975, Paul Sciabarrasi, Marine Midland Security Office, advised that this bank's deposits are insured by the Federal Deposit Insurance Corporation, under certificate number 589-4, dated July 31, 1970.

On June 2, 1975, the Town of Niagara, New York Police Department advised the Buffalo Office, FBI, that an attempted bank burglary had occurred at the Marine Midland Bank-Western, Military Road Branch, Town of Niagara, New York.

On June 2, 1975, Patrolman Douglas Johnson, Town of Niagara, New York Police Department, advised Special Agents of the FBI Robert N. Shaw and Richard D. Davidson that at approximately 12:53 AM, he heard over the police radio the following message, "Bank alarm, Marine Midland Bank, Military Road Branch." Patrolman Johnson responded and arrived at the bank approximately four or five minutes later, at which time he heard the audible alarm functioning.

Complaint and Affidavit dated June 2, 1975.

Observed

An examination of the building reflected that the side door of the garage of the aforementioned bank was opened. A closer examination of the door indicated that it had been forced open. Upon entering the garage area, a welding torch tip was found on the floor. The rear door of the bank bore a large hole where the bolt should be and the door had been pried open. A ~~smell of smoke~~ was present in the bank. Upon entering the night deposit room, Patrolman ^{O'Brien} Johnson observed two welding tanks, one red and the other ~~green~~ in color, a dark blue ski mask on the floor, a welder's glove on the table and two wastepaper baskets on the table. In one of the wastepaper baskets, there was a funnel with an approximately foot long black ~~hose~~ and three or four inches of water was in one of the baskets. A green garden hose lay on the floor. Further investigation indicated a large amount of water on the floor in front of the safe. In addition, a ~~small hole~~ was found in the left-hand corner of the night deposit vault.

On June 2, 1975, Anthony Pollock, Deputy Sheriff, Niagara County Sheriff's Office, advised Special Agent Robert N. Shaw, supra, that at approximately 1:15 AM, he observed an individual subsequently identified as James Wedalowski, date of birth September 17, 1952, walking on Military Road, approximately 500 to 600 feet north of the bank. Wedalowski was walking south toward the aforementioned bank. Pollock asked Wedalowski to identify himself, which

Complaint and Affidavit dated June 2, 1975.

he orally did by giving his name. Wedalowski stated that he was coming from down the street. Pollock inquired as to where down the street and Wedalowski stated that he was at some girl's house; but that he did not know the name of the girl or the street, or where he was at. Pollock requested some identification and Wedalowski stated he had lost his identification approximately two weeks ago. Pollock asked Wedalowski to produce any type of identification. Wedalowski stated he had no identification. Pollock noticed that Wedalowski's boots were wet and that his pants legs were soaked with water up to the knees. Observation of Wedalowski's clothing was made by Special Agent Richard D. Davidson, at which time it was noticed that Wedalowski's belt buckle contained what appeared to be red paint, similar in color to the red paint on the acetylene tank found in the night deposit room of the aforementioned bank. Further observation of Wedalowski's clothing showed burn marks on the jacket and the area of his trousers from the knee down were soaking wet.

On June 2, 1975, Craig Harmon, Deputy Sheriff, Niagara County Sheriff's Office, advised Special Agent Robert N. Shaw, supra, that at approximately 3:28 AM, he observed a 1973 Ford Thunderbird, two-door hardtop, bearing New York License 370 EDT, parked in front of 4992 Sweethome, Town of Niagara, New York, which is approximately one-half block

Complaint and Affidavit dated June 2, 1975.

south from aforementioned bank. Records of the Department of Motor Vehicles, were queried by Deputy Harmon and reflected that the aforementioned vehicle was registered to James F. Wedalowski, date of birth September 17, 1952, residence 228 Doat Street, Buffalo, New York. Special Agent Shaw observed through the window of the aforementioned car, a crowbar laying on the backseat.

V
true in all

Special Agent, FBI

Signed to and Sworn to
Before Me on this _____
Day of _____, 1975

U. S. Magistrate

Indictment dated November 12, 1975.

In the District Court of the United States

For the Western District of New York

THE UNITED STATES OF AMERICA

-VS-

JAMES FRANCIS WEDALOWSKI

MARCH, 1975 SESSION ~~XXXX~~
(Impaneled May 27, 1975)

No.

CR 75-249

Vio. Title 18, United States
Code, Section 2113(a)
and Section 2

The Grand Jury Charges:

On or about June 2, 1975, in the Town of Niagara,
in the Western District of New York,

JAMES FRANCIS WEDALOWSKI

defendant herein, did enter and attempt to enter the Marine
Midland Bank - Western, Military Road Branch, 4381 Military
Road, Town of Niagara, New York, the deposits of which were
then and there insured by the Federal Deposit Insurance
Corporation with intent to commit in said bank a felony or
larceny affecting the Marine Midland Bank - Western, Military
Road Branch;

In violation of Title 18, United States Code,
Section 2113(a).

RICHARD J. ARCARA
United States Attorney

A TRUE BILL:

FOREMAN

Notice of arraignment dated November 12, 1975.

NOTICE OF

ARRAIGNMENT

D. C. Form No. 18 (Rev. Sept. 1953)

United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

JAMES FRANCIS WEDALOWSKI

No. CR 75-249

TAKE NOTICE that the above-entitled case has been set for Arraignment at

10:00 AM , on TUESDAY, NOVEMBER 18 , 19 75 , at U.S. Courthouse,
ROOM 416
Niagara Square
Buffalo, NY 14202

Date November 12 , 19 75

Clerk.

By WILLIAM M. KERSTNY

Asst. U.S. Attorney

~~Deputy Clerk~~

To Salten Rosenberg, Esq., Attorney at Law, 400 Walbridge Bldg., Buffalo, NY 14202

cc Indict ✓

Notice of arraignment dated November 13, 1975.

NOTICE OF ARRAIGNMENT

D. C. Form No. 18 (Rev. Sept. 1953)

United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

JAMES WEDALOWSKI

No. CR 75-249

TAKE NOTICE that the above-entitled case has been set for Arraignment at

10:00 AM , on TUESDAY, NOVEMBER 25 , 1975 , at U.S. Courthouse,
ROOM 416
Niagara Square
Buffalo, NY 14202

CONFIRMING TELEPHONE CONVERSATION
THIS NOTICE SUPERSEDES PREVIOUS NOTICE

Date November 13 , 1975

Clerk.

By WILLIAM M. SERETNY
Asst. U.S. Attorney ~~Deputy Clerk~~

To Salten Rodenberg, Esq., Attorney at Law, 400 Walbridge Bldg., Buffalo, NY 14202.

Notice of Motion Schedule dated November 25, 1975.

NOTICE OF

J. C. Form No. 18 (Rev. Sept. 1963)

United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

JAMES WEDALOWSKI

No. CR-75-243



TAKE NOTICE that the above-entitled case has been set for (SEE BELOW) at
 on , 19 , at 416 United States
 Courthouse, 68 Court Street, Buffalo, New York.

Motions are to be filed by December 3, 1975. If no motions are filed
 by that date discovery will be deemed complete. If motions are filed
 the Government is to respond by December 12th and argument is scheduled
 for December 16, 1975 at 10:30 a.m.

Date November 25, 1975

Edmund F. Marvelli
 Edmund F. Marvelli : Clerk
 United States Magistrate

By _____
 : Deputy Clerk

To United States Attorney ✓
 Attn: William M. Skretny, Esq.
 Salten Rodenberg, Esq.

w1

Notice of Readiness for Trial dated December 10, 1975.

United States Department of Justice

ADDRESS REPLY TO
UNITED STATES ATTORNEY
ATTENTION OF
ASSISTANT SHOWN BELOW
William M. Skretny

OUR REFERENCE
WMS:hm

UNITED STATES ATTORNEY
WESTERN DISTRICT OF NEW YORK
UNITED STATES COURT HOUSE
BUFFALO, NEW YORK 14202
December 9, 1975

SaltenRodenberg, Esq.
Attorney at Law
400 Walbridge Bldg.
Buffalo, New York 14202

RE: United States of America v. JAMES WEDALOWSKI

CR No. 75-249

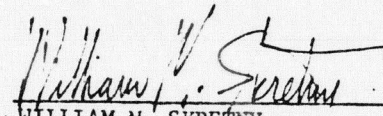
Dear Sir:

Enclosed please find a motion made by the Government relative to the above entitled matter wherein and whereby we have announced the above entitled action ready for trial and have moved said action on for trial. The original of said motion has been duly filed with the District Court Clerk's Office.

Very truly yours,

RICHARD J. ARCARA
UNITED STATES ATTORNEY

By:


WILLIAM M. SKRETNY
Assistant U.S. Attorney

Enclosure

Notice of Readiness for Trial dated December 10, 1975.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

CR NO. 75-249

v.

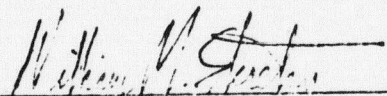
JAMES WEDALOWSKI

Defendant

The United States of America, plaintiff herein, being ready to proceed to trial in the above entitled action, hereby moves said action for trial and asks this Court to set it down for trial at the first convenient date of this Court's calendar following completion of any and all motions.

RICHARD J. ARCARA
UNITED STATES ATTORNEY

By:


WILLIAM H. SWEENEY
ASSISTANT U.S. ATTORNEY

United States District Court
FOR THE
WESTERN DISTRICT OF NEW YORK

WMS
ml

U. S.

v.

JAMES FRANCIS WEDALOWSKI

No. CR-75-249

TAKE NOTICE that the above-entitled case has been set for CALENDAR CALL at

2:00PM , on FEBRUARY 9 , 1976 , at PART II, U. S.
District Court, Buffalo, N.Y. before Hon. John T. Elfvin, on
Deft's Motion to Suppress and To Set Date for Trial, adjourned
from 1/26/76 at request of Deft. and approved by the Court.

Date January 27 , 19 76

.....JOHN K. ADAMS.....

Clerk.

ByRICHARD R. WALSH.....
Chief Deputy Clerk.

To *✓* RICHARD J. ARCARA
U. S. Attorney
U. S. Courthouse
Buffalo, N.Y. 14202

Attn: AUSA William J. Skretny

SALTEN RODENBERG, Atty.
400 Walbridge Bldg.
Buffalo, N.Y. 14202

Letter dated June 16, 1976.

William M. Skretny

WMS:mb
CR. 75-249

June 16, 1976

Mr. Salten Rodenberg
Attorney at Law
400 Wallbridge Building
Buffalo, New York 14202

Re: United States v. James F. Wedalowski

Dear Mr. Rodenberg:

This confirms our recent conversation relating to the matter of the voluntary production of hair samples by your client to the Federal Bureau of Investigation for laboratory analysis. Whenever your client is available, we will have an agent of the Federal Bureau of Investigation obtain the hair samples from him.

In light of the fact that a trial date may be near, your attention to this matter at your very earliest convenience will be most appreciated.

Thank you for your consideration and cooperation,

Very truly yours,

RICHARD J. ARCARA
United States Attorney

BY: WILLIAM M. SKRETNY
First Assistant U.S. Attorney

cc: Hon. John T. Elfvin
U.S. District Judge
610 U.S. Courthouse
Buffalo, N.Y. 14202

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H

Letter dated September 24, 1976.

William M. Skretny

WMS:mb
CR. 75-249

September 24, 1976

Mr. Salten Rodenberg
Attorney at Law
400 Walbridge Building
Buffalo, New York 14202

Re: United States v. James Francis Wedalowski

Dear Mr. Rodenberg:

Enclosed for your information is a copy of the lab report dated July 6, 1976 relating to hair sample analysis concerning the above-captioned case. It is our understanding that you already have lab reports dated August 5, 1975, August 27, 1975, September 16, 1975, and September 19, 1975.

If you have any further questions, please do not hesitate to contact this office at 842-3475, and please be advised that the Government is ready for trial.

Very truly yours,

RICHARD J. ARCARA
United States Attorney

BY: WILLIAM M. SKRETNY
First Assistant U.S. Attorney

Enc.

cc: Hon. John T. Elfvin
U.S. District Judge
614 U.S. Courthouse
Buffalo, N.Y. 14202

*Mr. Daniel
504 F. 2d
U.S. Court
504 F. 2d*

Letter dated October 4, 1976.

William M. Skretny

WMS:mb
CR. 75-249

October 4, 1976

Mr. Salten Rodenberg
Attorney at Law
400 Walbridge Building
Buffalo, New York 14202

Re: United States v. James Wedalowski

Dear Mr. Rodenberg:

As you are aware, Rule 12.1 of the Federal Rules of Criminal Procedure provides the Government with a vehicle for obtaining discovery of the defense's intention to offer proof of alibi. Since there is as yet no set trial date, please advise at your very earliest opportunity as to whether you will informally provide intention as to the offering of a defense of alibi, or whether you will require the Government to formally move.

Thank you for your consideration.

Very truly yours,

RICHARD J. ARCARA
United States Attorney

BY: WILLIAM M. SKRETNY
First Assistant U.S. Attorney

Letter dated January 19, 1977.

William M. Skretny

WMS:mb
CR. 75-249

January 19, 1977

Mr. Salten Rodenberg
Attorney at Law
400 Walbridge Building
Buffalo, New York 14202

Re: United States v. James F. Wedalowski
Criminal No. 75-249

Dear Mr. Rodenberg:

This concerns our correspondence of October 4, 1976 in which we requested your position concerning informal discovery in the event that it is the intention of the defense to offer proof of alibi. Your response, at your earliest convenience, to our request for information relating to alibi, will be appreciated.

In the event that your client is in this area and available for trial, please advise so that we may motion this matter up before the Honorable John T. Elfvin for purposes of setting a date for trial, in that the government remains ready for trial.

Thank you for your consideration.

Very truly yours,

RICHARD J. ARCARA
United States Attorney

BY: WILLIAM M. SKRETNY
First Assistant U.S. Attorney

Letter dated April 11, 1977.

April 11, 1977

William M. Skretny

WMS:mb
CR. 75-249

Mr. Salten Rodenberg
Attorney at Law
400 Walbridge Building
Buffalo, New York 14202

Re: United States v. James F. Wedalowski
Criminal No. 75-249

Dear Mr. Rodenberg:

Please advise concerning your client's physical condition and the status of the local charges pending against him.

We remain ready for trial.

Very truly yours,

RICHARD J. ARCARA
United States Attorney

BY: WILLIAM M. SKRETNY
First Assistant U.S. Attorney

cc: Hon. John T. Elfvin
United States District Judge
United States Courthouse
Buffalo, New York 14202

Motion for Speedy Trial filed July 11, 1977.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA

vs

No. Cr-75-249

JAMES FRANCIS WEDALOWSKI

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of his counsel, SALTEN RODENBERG, and upon all papers, documents, and prior proceedings had and filed herein, the defendant will move this Court for an order dismissing the indictment herein in all respects.

Defendant grounds his motion upon the specific provisions of the United States District Court, Western District of New York, Plan for Prompt Disposition of Criminal Cases; Rule 48 of the Federal Rules of Criminal Procedure that the time which has expired between his arrest and the time of filing of this application not only exceeds the limits established by the rules of this Court but also constitutes an unreasonable and inordinate delay, chargeable to the Government, which is violative of defendant's Sixth Amendment right to a speedy trial.

The within motion will be brought on to be heard before the HONORABLE JOHN T. ELFVIN, United States District Judge, on the 25 day of July, 1977, at 2:00'clock in the forenoon thereof.

T.18
3461 sub

Motion for Speedy Trial filed July 11, 1977.

DATED: Buffalo, New York
July 11, 1977

Yours, etc.,

Saltén Rodenberg
SALTEN RODENBERG

Attorney for Defendant
Office & P. O. Address
400 Walbridge Building
Buffalo, New York 14202

TO: HONORABLE JOHN T. ELFVIN
United States District Judge

WILLIAM J. SKRETTY, ESQ.
Assistant United States Attorney

Motion for Speedy Trial filed July 11, 1977.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs

No. Cr-75-249

JAMES FRANCIS WEDALOWSKI

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

SALTEN RODENBERG, being duly sworn, deposes and says:

That he is counsel for the defendant, JAMES FRANCIS WEDALOWSKI, and has been the attorney of record herein from the time of the defendant's arrest and apprehension, as hereinafter set forth; your deponent makes this affidavit in support of the defendant's motion to dismiss the indictment herein by reason of the inordinate and unreasonable delay in bringing such indictment on for trial, and states as follows:

FIRST: The defendant JAMES FRANCIS WEDALOWSKI, was arrested by Agents of the Federal Bureau of Investigation on the 2nd day of June, 1975. He was charged with a violation of 18 U.S.C. 2113(b), arraigned before the HONORABLE EDMUND F. MAXWELL, United States Magistrate for the Western District of New York, and released on \$5,000.00 bail.

SECOND: On the 10th day of June, 1975, a preliminary hearing was held before the HONORABLE EDMUND F. MAXWELL, and at

Motion for Speedy Trial filed July 11, 1977.

the conclusion thereof, defendant was held for further proceedings in the United States District Court, and continued on bail pending completion of the same.

THIRD: Thereafter and on or about the 12th day of November, 1975, a United States Grand Jury, impaneled for the Western District of New York, returned an indictment against defendant charging him with a violation of 18 U.S.C. 2113(a); the factual allegations of the indictment being the same as those contained in the complaint upon which the defendant had originally been held.

FOURTH: Defendant was arraigned upon the indictment herein on the 25th day of November, 1975, entered a plea of not guilty, and was continued upon the bail originally set.

FIFTH: On the 10th day of December, 1975, and 191 days subsequent to the defendant's arrest, the Government filed its statement of readiness and motion to move the indictment for trial.

SIXTH: On the 19th day of January, 1976, deponent filed and served motion papers, seeking an order suppressing the prosecutorial use of certain alleged evidentiary material seized pursuant to the execution of a search warrant which had been issued, directed against a vehicle owned by the defendant, on the 2nd day of June, 1975. This motion was returnable the 26th day of January, 1976, and was adjourned on motion of the Government and with the approval of the Court, to the 2nd day of February, 1976.

Motion for Speedy Trial filed July 11, 1977.

SEVENTH: The Government's response to defendant's suppression motion was not filed nor served until the 6th day of February, 1976, and argument was made on said motion on the 9th day of February, 1976.

EIGHTH: Defendant's attack upon the search warrant was two pronged. The first basis submitted by defendant was that the affidavit, on its face, did not contain sufficient factual allegations to establish probable cause. The second basis was that the affidavit in material allegations, contained erroneous and false statements of fact. Defendant, therefore, moved in the alternative for an order of suppression, or the holding of a hearing for the purpose of determining the factual questions raised based upon the second prong of his attack.

NINTH: At the close of argument on the 9th of February, 1976, the Court reserved decision and caused to be entered into the docket a notation establishing 30 days as excludable delay in the decision thereon.

TENTH: From the date of the Court's reservation of decision, as aforesaid, no action was taken by the Court, nor was any action taken by the Government to prompt a decision in the matter, and it was not until the 17th day of May, 1977, (an excess of 15 months from the date of reservation) that the Court filed its memorandum and order denying the motion to suppress, without prejudice, and granting a hearing on the question raised as to the truth of the allegations contained in the application for the search warrant.

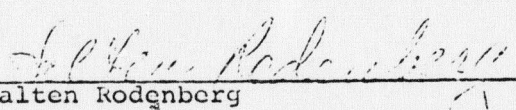
Motion for Speedy Trial filed July 11, 1977.

ELEVENTH: On June 20, 1977, the hearing was held before this Court and on the 7th day of July, 1977, the Court's findings and order denying the defendant's motion in all respects, were filed with the Clerk of this Court.

TWELFTH: The foregoing recital, verified by docket entries, shows that more than 25 months have elapsed since the defendant was first taken into custody; that only 31 days of excludable delay have been endorsed upon the docket in this proceeding; that with the exception of a seven-day adjournment in May, 1977, no delays can be attributed to the defendant or his counsel.

THIRTEENTH: That by reason of the foregoing, the delay herein has been inordinate and unreasonable; not chargeable to the defendant; and by its very nature prejudicial to his rights as guaranteed by the Constitution of the United States and in direct contravention to the mandates of the rules of this Court which require positively and absolutely that the Government be ready for trial within 180 days from the date of arrest or apprehension, except on good cause shown; and it is respectfully submitted that cause does not exist either for the delay in filing the Government's certificate of readiness, or for the Court's delay in determining the motion to suppress.

WHEREFORE, your deponent respectfully requests, on behalf of the defendant Wedalowski, an order dismissing the indictment herein, with prejudice.


Salten Rodenberg

Transcript of oral argument, findings and order from
July 25, 1977 and July 27, 1977.

1 UNITED STATES DISTRICT COURT

2 WESTERN DISTRICT OF NEW YORK

3 * * * * *

4
5 THE UNITED STATES

6 -v-

CR-75-249

7 JAMES FRANCIS WEDALOWSKI

MOTION TO
DISMISS

8 DEFENDANT

9 * * * * *

10
11 Transcript of Motion by defendant to dismiss
12 indictment before the HON. JOHN T. ELFVIN, United States
13 District Judge, in Part II, United States Courthouse,
14 Buffalo, New York, on July 25, 1977.

15
16 APPEARANCES:

RICHARD J. ARCARA
United States Attorney
BY: JAMES A. FRONK, ESQ.
Ass't United States Attorney

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19 SALTEN RODENBERG, ESQ.
Attorney for the Defendant
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Transcript of oral argument, findings and order from
July 25, 1977 and July 27, 1977.

1 PROCEEDINGS: July 25, 1977

2 APPEARANCES: As Before Noted

3

4 THE COURT: Criminal 75-249, United States
5 versus Wedalowski.

6 All right, Mr. Rodenberg.

7 MR. RODENBERG: Your Honor, in support of our
8 position expressed in the Motion
9 to Dismiss the indictment now pending
10 against Mr. Wedalowski for a failure
11 to afford him a speedy trial either
12 under the Speedy Trial Act Rule 48 or
13 insofar as a possible violation of
14 due process which he is entitled to
15 is concerned although at the outset,
16 I would point out to the Court that
17 I do agree that we would be hard
18 put to show any actual bias accruing
19 to us as might be required by the
20 due process requirement. However,
21 your Honor, I do not believe that
22 there is any question but the
23 defendant Wedalowski is presently
24 entitled to a dismissal of the indict-
25 ment pending against him, be it with

Transcript of oral argument, findings and order from
July 25, 1977 and July 27, 1977.

1 prejudice or without prejudice, since
2 he was arrested June 2nd, 1975. The
3 Government filed a Notice of Readiness
4 some one hundred and ninety-four days
5 later. I believe it was - was it
6 December 10th?

7 MR. FRONK:

Yes.

8 MR. RODENBERG:

I believe it was December 10,
9 your Honor. Now there may be seven
10 days of that period which could be
11 chargeable to the defendant because
12 Mr. Fronk has brought to my attention
13 that there was an adjournment for
14 a seven day period evidently at
15 my request. Now, I have no recol-
16 lection of that but I want the Court
17 to understand that if Mr. Fronk
18 tells me this is so, plus the fact
19 that it so appears on the docket
20 sheet, that I will not seriously
21 challenge that seven day adjournment
22 being at my request. However, the
23 second circuit, your Honor, in the
24 United States versus McDonough
25 decided back in 1974, the citation for

Transcript of oral argument, findings and order from
July 25, 1977 and July 27, 1977.

1 which is 504 F. 2d 67 decided as I
2 think I have mentioned by this
3 Circuit, says this - I would prefer
4 to read since it is short, the
5 language expressed in the decision,
6 "We would add, however, a few words
7 that may be helpful to Judge Neaher
8 upon the remand. First, as we read
9 Flores, at 1360, there is no de minimis
10 time period under the six months'
11 rule; the Government "must be ready
12 for trial within six months . . .,"
13 not six months and three days, four
14 days, five days or nine days. This
15 has to be the case since we are
16 dealing with a clear line of time -
17 much like a statute of limitations -
18 marked for prophylactic purposes,
19 not to be analogized to the equitable
20 doctrine of laches. There are any
21 number of "excluded periods" " under
22 the rule which applied in the
23 Eastern District where this case
24 was decided. Subsequently, your
25 Honor, we have had the case decided

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1 by the Second Circuit, I believe
2 last January, United States against
3 Vispi where the Court makes quite
4 clear that any extended periods of
5 time which caused delay in trial
6 unless clearly excludable should
7 lead inevitably to a dismissal of
8 the indictment, be it with or without
9 prejudice. Now, there are other
10 cases which decides the identical
11 issue pretty much along the same
12 line, and that is United States
13 against West, 504 F.2d decided in
14 1974, other cases which I can hand
15 up, citations which I can hand up
16 to the Court if the Court is
17 interested in reviewing them at
18 this time. I'm certain that --

19 THE COURT:

Well, any that you have --
20 Have you filed a Memorandum in which
21 they --

22 MR. RODENBERG:

No, I have not filed a formal
23 Memorandum.

24 THE COURT:

Just give me the citations,
25 if you would, any that you want me

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1 to look at.

2 MR. RODENBERG:

There is United States against
3 West, 504 F.2d at page 253 decided
4 back in 1974, United States against
5 Salzmann, 417 F. Supp. 1139 decided
6 1976. Of course, your Honor, that
7 is a District Court decision, that
8 is not in the Second Circuit.

9 THE COURT:

Federal Supp.?

10 MR. RODENBERG:

The Court of Appeals --

11 Federal Supp., sir.

12 United States against Scafo,
13 480 F.2d 1312, 1973. Those are the
14 cases, your Honor. As I have said,
15 with emphasis on the McDonough case
16 decided in this Circuit and the
17 very recent decision which I think
18 is directly in point, sir, decided
19 in the Vispi case which is 545 F.2d
20 at page 328.

21 Now, the Notice of Motion, your
22 Honor, I think includes the time
23 periods which lead to this motion
24 to dismiss --

25 THE COURT:

I can see that this has been

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1 very specific on your dates in your
2 Affidavit.

3 MR. RODENBERG:

4 Yes, your Honor. As I say, it
5 is our position that there was
6 a hundred and ninety one day delay.
7 If the seven days adjournment is
8 chargeable to the defendant, then,
9 of course, we have a hundred and
10 eighty four days but we have got
11 the McDonough case which says if it's
12 a hundred and eighty one days it's
13 too late if there is no more excludable
14 time insofar as the hundred and eighty
15 days is concerned. Then, of course,
16 your Honor, we have got the fifteen
17 month period during which a decision
18 was pending on a motion to surpress
19 which had been made back in January
20 19, 1976. I do believe, your Honor,
21 that the language of the Speedy
22 Trial Act and the requirements of
23 Rule 48 would mandate or describe
24 the situation which would mandate
25 a dismissal for a failure to afford
this defendant a speedy trial. That

1 is substantially it. But the two
2 cases I mentioned are the cases I
3 rely on.

4 THE COURT:

Thank you, Mr. Rodenberg.

5 Mr. Fronk.

6 MR. FRONK:

7 Your Honor, I seem to have a
8 different computation but I guess
9 that is what makes horse races. As
10 I compute the time from June 2nd,
11 a hundred and eighty days would run
12 without any excludable time period
13 on or about December 2, 1975. We
14 filed our notice of readiness on
15 the 10th of that month which would
16 without any excludable time period
17 be eight days over the hundred and
18 eighty. If we take notice that the
19 arraignment was scheduled for the
20 18th of November, 1975, it was
21 adjourned until the 25th of November,
22 1975 at the request of the defendant,
23 counting the 18th would give us an
24 eight day excludable time period
25 before the defendant was arraigned.
In addition, there was a preliminary

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1 hearing on that case and it took
2 the better part of a day and that
3 would be one more day which would
4 be applicable to the excludable time
5 period provided in the Act. There-
6 fore, we would under the technical
7 requirements have filed our Notice
8 of Readiness for trial one hundred
9 and eighty days after arrest. If
10 we allow the extra day it would be
11 a hundred and seventy nine days so
12 I think we are going to meet the
13 stringent standards of the hundred
14 and eighty day rule as it existed
15 in our Circuit. Under the Speedy
16 Trial Act in our Plan for the
17 Western District of New York, which
18 now governs the disposition of cases,
19 any indictments or informations
20 filed before the 1st of July, 1976
21 would have to be tried within a
22 hundred and eighty days thereafter.
23 We would have made again the time
24 limits under that hundred and eighty
25 day rule of having been ready for trial,

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1 but for I would submit now, the
2 decision on the motion to suppress
3 that was pending before your Honor
4 filed by Mr. Rodenberg. I might
5 add for the Court's benefit that
6 since our Notice of Readiness was
7 filed on the 10th of December, 1975,
8 the only proceedings which took
9 place after that was the filing of
10 the motion requesting a hearing on
11 behalf of Mr. Rodenberg. We
12 responded approximately one week
13 later. My next notice in the file
14 is that on January 27th there was
15 a calendar call and the defendant's
16 motion to suppress and to set a date
17 for trial were adjourned at the
18 request of the defendant and that
19 was approved by the Court. All the
20 time after that time was taken up
21 in the decision on that motion as
22 to whether a hearing should be
23 granted. Now, under the Vispi case
24 a twenty month delay was not per se
25 excessive, and in this case we have

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1 only got fifteen months since our
2 Notice of Readiness was filed, so I
3 would submit that is not per se
4 excessive for purposes of the Act.
5 In that time period we wrote to the
6 defense attorney and to the Court
7 on September 24, 1976, October 4th
8 of '76, January 19th, 1977, and
9 April 11, '77, and each letter
10 indicating we were continuously
11 ready for trial as set forth in our
12 Notice filed in December of 1975.
13 So under the rationale of the Vispi
14 case, we were constantly bringing
15 to the defense attorney and to the
16 Court's attention the fact that we
17 were ready for trial during this
18 hiatus while the motion was under
19 consideration. Additionally, as
20 Mr. Rodenberg has indicated, under
21 the Sixth Amendment he has to show
22 among other things the delay was
23 terribly excessive, that there was
24 some prejudice to the delay and that
25 he made continuous demands or some

1 demands for a speedy trial. I
2 would submit, your Honor, that my
3 examination of these docket sheets,
4 my correspondence file, indicates
5 that other than this instant motion
6 for speedy trial for dismissal,
7 there weren't any other specific
8 demands made of your Honor for an
9 early trial date. In that fifteen
10 month period, the Government made
11 several notices to the defense counsel
12 and the Court that we were continuously
13 ready. The thrust of my argument
14 then, and I have not submitted
15 this to your Honor in a brief, is
16 that we were ready within one hundred
17 and eighty days and even if we are
18 one day under the wire so that we
19 would meet speedy trial grounds under
20 that definition. Either under the
21 old Rule 48 or the new Rule for
22 Speedy Disposition of cases we both
23 have a hundred and eighty day limit
24 and I think that we meet it given
25 those short periods of excludable

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1 time. In the interim period since
2 our filing the Notice approximately
3 fifteen to sixteen months have gone
4 by, in that time we have indicated
5 our readiness for trial, we have
6 been continuously ready, we have
7 advised the Court and defense counsel
8 we submit no prejudice has accrued
9 to the defendant, that he hasn't
10 made specific demands for a speedy
11 trial and that the matter should not
12 be dismissed. The Vispi case, not-
13 withstanding any sanctions called
14 for under the Plan which is now in
15 effect, I don't believe dismissal
16 is one of the sanctions called for
17 under - it's part eleven of the
18 Plan in effect for the Western
19 District of New York. Under Part
20 C when the Government is not ready
21 for trial within six months if the
22 defendant affirmatively pleads
23 within ten days for a dismissal due
24 to our failure to be ready there is
25 a sanction of dismissal. I submit

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1 that Section is not applicable
2 because we were ready within a
3 hundred and eighty days. And under
4 Paragraph 11 (e), dismissal is not
5 an appropriate sanction at this time
6 period. At a later time period it
7 would be an appropriate sanction.
8 Therefore, in the absence of actual
9 prejudice, in the absence of a
10 terrible excessive time period, and
11 I say fifteen months is not per se
12 excessive, I don't think that in the
13 Court's discretion that a motion to
14 dismiss should be granted, at least
15 certainly not for the alleged vio-
16 lation of the hundred and eighty
17 day rule.

18 THE COURT:

19 The problem is in the case, of
20 course, at least as I think the
21 problem at this point is, of course,
22 the length of time that I myself
23 took in disposing of the motion to
24 suppress, and I do indicate that
25 there was no prejudice to the
defendant, and I know that there

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1 is no mandate that the case be
2 dismissed because of the hundred
3 and eighty day rule on starting
4 trial, and yet undoubtedly, there
5 has been a gross abuse of that rule.

6 Now, have you finished what you
7 have to say, Mr. Fronk?

8 MR. FRONK:

Yes, your Honor.

9 THE COURT:

Mr. Rodenberg, what about
10 prejudice to the defendant on account
11 of the delay?

12 MR. RODENBERG:

Your Honor, as of this point,
13 as I indicated to you the last time
14 we were in here and as I said a
15 few moments ago, right now I can't
16 pinpoint any one area and say the
17 delay hurt me in this area. I don't
18 know, however, your Honor, --

19 THE COURT:

When you say hurt you, you mean
20 hurt your client?

21 MR. RODENBERG:

Hurt my client, yes.

22 I don't know, however, your
23 Honor, what testimony may be forth-
24 coming which indeed may demonstrate
25 that the delay caused prejudice to

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1 the defendant. I would only be
2 guessing at this. I do not agree,
3 of course, with the United States
4 Attorney on the one day business
5 though I don't think that that is
6 that critical. A preliminary hearing
7 was had in one day, it was decided
8 the same day, it was something like
9 eight days after Mr. Wedalowski
10 has been arrested, so I can't see
11 how that enters in as an excludable
12 delay. Now, maybe it is. Insofar
13 as the week is concerned, if the
14 docket sheet shows it is at my
15 request, even though I have no
16 recollection, I'm certainly not
17 going to quarrel with it, and Mr.
18 Fronk pointed out to me that indeed
19 the docket sheet did show that,
20 that's the end of that. I do not
21 believe, however, your Honor,
22 assuming that this does bring it
23 under a hundred and eighty days
24 that the only alternative then to
25 enable the defendant to secure the

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1 benefit of dismissal because of the
2 time lapse is that we show actual
3 prejudice. I do believe that the
4 language in Vispi, your Honor, is
5 such that it would come within the
6 circumference of our fact situation,
7 and would mandate a dismissal at
8 this point again, be it with or
9 without prejudice. Mr. Fronk says
10 this brings it down to a hundred
11 and seventy nine days if the exclusions
12 he argues for are actually some time
13 the Government is entitled to, deduct
14 from the hundred and eighty days.

15 I calculated it as a hundred and
16 ninety one so I would get a hundred
17 and eighty three. Now, I don't know.
18 I would have to sit down and figure
19 it out, but the McDonough case if
20 it does come to a hundred and eighty
21 three days or even a hundred and
22 eighty two days, would indicate, and
23 now we are talking about our own
24 Circuit, that there must be a dis-
25 missal.

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1 THE COURT:

Well, I will study McDonough
and I will study Vispi and if neither
of those mandates a dismissal, and
I will decide that this afternoon,
but if neither one mandates a dis-
missal then I would go ahead with
the selection of the jury in the
morning and the taking of evidence
in the case and I would look through-
out that evidence for any indication
that defendant had been prejudiced
by the delay and would consider that
along with or consider that as part
of your motion to dismiss. So we
will leave it that way.

16 MR. FRONK:

Judge, my only concern is if
after examining the cases that you
have indicated you indicate that
dismissal is not mandated per se,
I guess the motion would be either
denied at this time subject to a
reconsideration at the end of trial.
If it is, I think the Act calls for
a finding on the delay of some sort
at that time, I suppose it would be

1 the time period from our filing
2 the Notice of Motion to the date
3 of trial.

4 THE COURT:

Well, I would expect that -
5 of course, if I would find that there
6 had not been a lapse of more than
7 a hundred and eighty days prior to
8 the Government announcing its
9 readiness obviously I would make
10 a finding in that regard because
11 the Government's failure to be
12 ready within the hundred and eighty
13 days would mandate a dismissal on
14 merit. If the Government was ready
15 in not longer than a hundred and
16 eighty days, then we have the con-
17 sideration of whether the case has
18 commenced trial within a hundred
19 and eighty days, and in that
20 situation, there is no longer a
21 mandate for dismissal in this
22 situation. It would be up to me,
23 and I frankly would look for any
24 prejudice to the defendant on account
25 of the delay in deciding whether or

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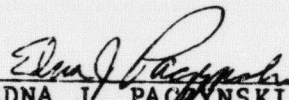
1 not that should be dismissed and,
2 of course, I detriment the defendant
3 not at all because obviously a lot
4 of that extra delay would have been
5 chargeable to me in sitting on the
6 motion and not disposing of the
7 motion. If there be prejudice it
8 won't matter whether it was my fault
9 that the thing had been delayed and
10 then the defendant would have the
11 benefit of it.

12 MR. FRONK:

All right, your Honor.

13 * * * * *

14 I CERTIFY that the foregoing
15 is a complete and accurate
16 transcription of my
17 Stenotype note taken herein.

18 
EDNA J. PACEYNSKI
19 OFFICIAL REPORTER,
USDS, WDNV

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1 UNITED STATES DISTRICT COURT

2 WESTERN DISTRICT OF NEW YORK

3 * * * * *

5 THE UNITED STATES

6 -v-

CR-75-249

7 JAMES FRANCIS WEDALOWSKI

MOTION TO
DISMISS

8 DEFENDANT

9 * * * * *

11 Proceedings held before HON. JOHN T. ELFVIN

12 United States District Judge, in Part II, United States
13 Courthouse, Buffalo, New York, on July 27, 1977.

15 APPEARANCES:

RICHARD J. ARCARA
United States Attorney
BY: JAMES A. FRONK, ESQ.
Ass't United States Attorney

18 SALTEN RODENBERG, ESQ.
19 Attorney for the Defendant

20
21
22
23
24
25
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1 PROCEEDINGS: July 27, 1977 (JURY NOT PRESENT)

2 APPEARANCES: Same as Before Noted

3 THE COURT: This is in the matter of
4 Criminal 75-249, United States
5 versus Wedalowski.

6 The record should show that
7 Mr. Wedalowski is present in court
8 with his attorney, Mr. Rodenberg
9 and Assistant United States Attorney
10 Mr. Fronk.

11 I have before me the motion
12 made by the defendant for a dismissal
13 of the case against him of the
14 indictment because of the failure
15 to observe the precepts of the
16 Speedy Trial Act and of Rule 48 (c)
17 of the Federal Rules of Criminal
18 Procedure and of the local Court
19 Plan which had been in effect prior
20 to July 1, 1976. The Rule itself
21 is an independent consideration but
22 the Rule 48 (c) is an independent
23 consideration, but the local Rule
24 and the Speedy Trial Act and District
25 Court Plan adopted thereunder inter-

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1 face or coterminate run into each
2 other. Now, I don't have problems
3 frankly, with the question of
4 dismissal under Rule 48 (c). It is
5 true that there has been a lengthy
6 time passing since the time when
7 defendant was arrested on June 2,
8 1975, and a great deal of that
9 time was occupied by myself in
10 really not deciding, not getting
11 into an order by decision on
12 defendant's motion to dismiss -
13 rather the evidence that was found
14 in the trunk of Mr. Wedalowski's
15 car, that motion was briefed and
16 argued and submitted to me I believe
17 as of February 6, 1976, and it was
18 not until, again drawing on my
19 memory, May 17 of 1977 when I finally
20 handed down an Order. Now, there
21 has been no showing of prejudice
22 and, of course, that is one of the
23 criteria under Barker versus Wingo
24 of the Supreme Court decision of
25 the Supreme Court of the United States,

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1 and Mr. Rodenberg has been frank
2 enough to state that to this point
3 he has not been able to demonstrate
4 such and he has left it that perhaps
5 in and during the taking of evidence
6 on trial, some such prejudice might
7 show itself and be paid attention to.
8 Now, looking at the other aspect,
9 namely, Rule 50 which had been in
10 effect prior to July 1, 1976 and the
11 requirements of the Speedy Trial
12 Act and the District Court's Plan
13 adopted thereunder to take care of
14 the interim situation until the
15 Speedy Trial Act finally phases
16 itself in on July 1, 1979, there are
17 two aspects there, one has been
18 and is a fairly rigid requirement
19 that the Government be ready at a
20 certain time after the charging
21 incident, whether that charging
22 incident be the arrest as it was
23 in this case, a complaint filed,
24 an information filed or an indictment
25 filed. So that period of six months

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1 as it was under that Rule 50, and I
2 interpret six months to mean
3 exactly what it says and not a hundred
4 and eighty days that the Government
5 had to be ready and not later than
6 December 2, 1976 - 1975, is that
7 correct, 1975?

8 MR. FRONK: Yes, your Honor.

9 THE COURT: The Government actually in
10 writing announced itself as ready
11 December 10, 1975, am I right in
12 that date, Mr. Fronk?

13 MR. FRONK: That is correct, your Honor.

14 THE COURT: Now, I had said July 1, 1976
15 as the effective date, am I wrong
16 in that Mr. Bono, correct?

17 MR. BONO: The current local Plan was in
18 effect July 1, 1976.

19 THE COURT: 1976. Actually what we are
20 considering then is whether or not
21 the Government was ready, I think
22 that is the way it is specified in
23 timely fashion pursuant to the
24 earlier Rule. Now, there has been
25 some consideration of a so-called

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1 seven day period when the arraign-
2 ment of Mr. Wedalowski was delayed
3 following his return on the indict-
4 ment, the filing of the indictment
5 and whether or not that should affect
6 the tolling of the six month period
7 for that period of time. There also
8 was in that initial six months period
9 a one day's tolling being the day
10 of the holding of the preliminary
11 hearing. So you can see how critical
12 the seven days becomes. With the
13 seven days December 10, 1975 is the
14 final day and the Government on that
15 day would have announced itself
16 ready in writing without the seven
17 days December 10 is too late a date.
18 I understand, Mr. Fronk, you also
19 have a consideration of whether or
20 not the Rule 50 (b) can be or could
21 have been satisfied by something
22 short of an announcement in writing.
23 So it's those two aspects I really
24 want to address myself to. And
25 there was my own failure to rule

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1 on the motion to suppress, of course,
2 is a period - is for a period longer
3 than the one hundred and eighty days
4 that is contemplated by the Speedy
5 Trial Act and the District Plan
6 adopted thereunder, that hundred and
7 eighty day period would have commenced
8 July 1, 1976, and as a consequence
9 approximately ten and a half months
10 went by as opposed to the hundred
11 and eighty days. Now, of that, of
12 course, the interim Plan and the
13 Speedy Trial Act contemplates a
14 tolling of that period for a maximum
15 of thirty days while a motion is
16 pending undecided and that would
17 take care of thirty days of the
18 excess period, and there was thereafter
19 I think no problem because while
20 there was a certain further delay
21 in setting the date for trial a
22 good portion of that, namely four
23 days or more, were occupied in a
24 further hearing concerning the
25 suppression or quashing of the search

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1 warrant, we took evidence as to
2 whether there had been knowing an
3 intentional misrepresentation to
4 the Magistrate in the affidavit
5 of the FBI Agent, Mr. Davidson,
6 and there was a period after that,
7 a shorter period than thirty days
8 when I, after the hearing had been
9 closed and I deemed it submitted
10 again rendered my opinion. Violation
11 of that one hundred and eighty day
12 period, namely, the failure to bring
13 the defendant to trial to actually
14 start the trial within the hundred
15 and eighty days following July 1,
16 1976 with the credit given to what-
17 ever tollings occurred does not
18 mandate dismissal. I find myself
19 in that situation again really
20 looking at the criteria that are
21 set up in the Barker v Wingo case.
22 Again I come back to no showing
23 so far as I can see and as far as
24 what has been shown to me any
25 prejudice to Mr. Wedalowski so I

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1 think we are looking fully upon
2 the strictures and the literality
3 of the requirements that the Govern-
4 ment be ready. I will listen to
5 either one of you in that regard,
6 probably Mr. Fronk, you bear the
7 burden on it.

8 MR. FRONK:

Addressing, your Honor, just
9 the narrow issue of our advising
10 the Court of our readiness as
11 required under the Plan in effect
12 at the time, the Plan for achieving
13 prompt disposition of criminal
14 cases or what was commonly known
15 as the old Second Circuit Rule for
16 Speedy Trial. It's true that charges
17 were lodged originally against this
18 man on June 2, 1975 and that the
19 hundred and eighty days would begin
20 to run from that period. It's also
21 undisputed that we filed our standard
22 form Notice of Readiness on December
23 10, 1975. In the literal amount of
24 days expiring between those two
25 dates is over one hundred and eighty

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1 I will concede that. There are
2 several points that I think will
3 at least bear some merit in this
4 discussion. One excludable time
5 period when this matter was subject
6 to a preliminary hearing in front
7 of Magistrate Maxwell would be one
8 day in question. Again the matter
9 was indicted some months later,
10 November of 1975 and an original
11 notice for arraignment was mailed
12 out on the 12th of November, 1975
13 to Mr. Rodenberg advising of an
14 arraignment day a week later. Now,
15 it's my interpretation under the
16 Act there are excludable time
17 periods under Rule 5, the time from
18 the notice of arraignment to the
19 arraignment would be excludable time.
20 In the case cited by Mr. Rodenberg,
21 U.S. v. McDonough appears to set
22 forth that language exactly as being
23 an example of excludable time under
24 the Plan. Upon receiving that notice,
25 Mr. Rodenberg contacted our office

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1 and indicated that for some reasons
2 either for his trial convenience,
3 for the defendant's convenience,
4 that some manner or means at his
5 request, he wanted an adjournment
6 of the arraignment from the 18th
7 of November as originally set to the
8 25th. Accordingly, a new notice
9 was mailed out on the 13th of November
10 advising that at further defendant's
11 request adjournment was granted to
12 the 25th for the arraignment on this
13 indictment. We would contend under
14 the McDonough case, your Honor, that
15 the time period from the notice that
16 we take the 13th as a new notice
17 date to the 25th would be excludable
18 time, both as being a general period
19 of exclusion the time of notice to
20 the time of arraignment, and for
21 the further reason that any further
22 adjournment in that swift schedule
23 of arraignment was occasioned at
24 the request of the defendant. If
25 we take that period of time from the

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1 13th to the 25th and if we take
2 the one day for the preliminary
3 hearing, then we would meet our
4 commitment of indicating our readiness
5 within a hundred and eighty days.
6 There are several other considera-
7 tions, I would like to bring to the
8 Court's attention. I can't cite
9 the case now and I have just sent
10 someone down to get it, there is
11 indication by the Second Circuit
12 that although they are loath to
13 accept this as a standard rule
14 if the Government indicates its
15 readiness to the defendant and the
16 Court in any manner it will toll
17 that statute. By far the best way
18 and the approved way and the efficient
19 way is by filing a Notice of Readiness
20 but at any time the Government
21 indicates orally to the Court that
22 they are ready for trial and to the
23 defense attorney the Second Circuit
24 has sanctioned that as a requisite
25 way of tolling that statute. Now,

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1 I have not yet been able to verify
2 through the Magistrate's Court that
3 Mr. Skretny, the Assistant handling
4 this case, would have ever said he
5 was ready for trial on the date of
6 arraignment. I am checking that
7 now because it is a possibility.
8 There is another way which has been
9 sanctioned -- By the way I do have
10 the cases now which support that
11 position. It's U.S. v. Masullo
12 489 F.2d 217, and the critical
13 language is at page - I believe it's
14 at page 224 of that decision, your
15 Honor. The other case would be
16 the U.S. versus Pierro, and that's
17 478 F.2d at 386 which is cited with
18 approval in the Masullo case, "al-
19 though the Government must communicate
20 its readiness in some fashion, we
21 have held that the rules do not
22 require any formal notification
23 procedure." And although both of
24 those decisions indicate that it
25 is not the best way to proceed and

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1 it's not the prudent fashion, it is
2 okay for the purposes of the Act.
3 I'm attempting to find out within
4 the next couple of minutes whether
5 this case was included in our
6 report to the Second Circuit with
7 copies to the various courts as a
8 case in which we were ready for
9 trial prior to our formal filing
10 on December 10th and I maintain that
11 should I be able to come up with
12 that within the next few minutes
13 that that earlier date should exist
14 would be a date which would toll
15 the statute.

16 Finally, your Honor, this man
17 was arrested on the second of May,
18 1975 and charged with a bank burglary,
19 a preliminary hearing was held and
20 probable cause was found. Therein
21 there ensued approximately a five
22 month - four months delay prior to
23 indictment. We contend that a good
24 part of this delay between the filing
25 of the information - excuse me -

1 between the charge and the complaint
2 and the indictment was occasioned
3 by the fact that this is a bank
4 burglary which took place in the
5 middle of the night, no defendants
6 were caught on the scene, there are
7 no eye witnesses. There were dozens
8 of exhibits found at the scene and
9 in the defendant's vehicle. The
10 majority of this whole case is
11 scientific testing. Dozens of paint
12 scraping and paint samples from
13 objects were taken, soil samples
14 from the floor of the bank were
15 analyzed, hair samples were taken
16 at a later date, samples of the
17 clothing and the fibers in the
18 clothing of the defendant's clothes
19 were analyzed against various
20 articles found in the bank. This
21 scientific testing went on con-
22 tinuously by the FBI lab and finally
23 results were never obtained until
24 the latter part of September, 1975.
25 We would maintain that under U.S.

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1 v. Oliver, a case which was argued
2 in front of Judge Curtin and appealed
3 to the Second Circuit, and under
4 U.S. v. Vispi that some of this
5 delay in that time period was not
6 delay in which we weren't trying
7 to get ready for trial, it was delay
8 occasioned by the facts of this
9 case in the mass of scientific
10 evidence and that took several months,
11 and I don't think it's consonant
12 with the spirit of the Act to hold
13 us accountable when it comes down to-
14 when it comes to a hundred and eighty
15 one or a hundred and eighty two days
16 and a majority of that time was
17 taken up while we were building
18 the case waiting for scientific
19 evidence, I don't think it's con-
20 sistent with the Act to say that we
21 were not ready for trial when all
22 of our attentions were directed toward
23 that end. So for the reasons I've
24 cited and the cases I've cited, I
25 think, A, that even if we're held

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1 to the date of December 10th that
2 we have excludable time under Rule
3 5 of the Plan in some fashion; B,
4 I think there may well be an earlier
5 indication of our readiness that I
6 can produce to the Court this
7 morning; and, C, I think that we
8 ought to have some exclusion for the
9 time which was occasioned by the
10 scientific testing, be it an
11 exceptional circumstance which was
12 never defined, that's exception 5 (h)
13 or whether it's - whether it's within
14 the other definitions of excludable
15 time.

16 MR. RODENBERG:

Your Honor --

17 THE COURT:

Let me look, Mr. Fronk, relative
18 to the tolling of the time on this
19 delay for arraignment.

20 MR. FRONK:

Your Honor, I would look to
21 5 (c) in support of my argument
22 for the scientific testing. There
23 is evidence material to the Govern-
24 ment's case which was unavailable,
25 it was unavailable by virtue of

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1 the fact that the scientific testing
2 was still actively going on. In
3 support of the excludable period
4 for the arraignment, well, it could
5 come under 5 (a) or 5 (b), there was
6 a period of delay which was occas-
7 sioned at the request of the
8 defendant. It was a delay of a
9 Court appearance, an official
10 important part of the criminal
11 process and it wasn't an extensive
12 period, an extended period of any
13 kind.

14 THE COURT:

Although the examples given
15 in 5 (a) is expressly said not to
16 be all inclusive, I don't in looking
17 over those examples find anything
18 comparable.

19 MR. FRONK:

Well, I find other examples,
20 maybe in the Oliver case.

21 THE COURT:

You cited that relative to the
22 scientific analysis required.

23 MR. FRONK:

Well, yes, your Honor, and
24 also there they indicated that
25 continuances and adjournments were

1 agreed to for the purpose of giving
2 the defendant an opportunity to
3 cooperate with the drug officials
4 and they sanctioned that because it
5 was a size (b) exclusion, period
6 of delay resulting from a continuance
7 granted by the District Court where
8 the request dealt with the consent of
9 counsel. Now, if they've extended
10 it to periods wherein a man indicates
11 that he might want to cooperate with
12 Federal Officials then I certainly
13 think we can squeeze in a time for
14 adjournment of a judicial hearing
15 under Rule 5 (b).

16 THE COURT:

 I don't see how delay in
17 arraignment has anything to do
18 with unavailability of the defendant
19 or the Government facing some decision
20 as to whether or not to go ahead
21 with the prosecution which might be
22 the situation where there was going
23 to be cooperation --

24 MR. FRONK:

 This would have been a case
25 which was already indicted. The

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1 Oliver case, I have the slip opinion
2 so I can't give your Honor the
3 actual cite.

4 THE COURT: Well, arraignment followed the
5 indictment also in this case.

6 MR. FRONK: Well, we would contend your
7 Honor, that in the example of
8 the arraignment it's a period of
9 delay which would have been resulting
10 from a continuance granted by the
11 Court at the request of or with the
12 consent of the defendant and his
13 counsel and I think that's broad
14 enough to certainly cover --

15 THE COURT: This was not granted by the
16 Court, not even by the Magistrate.

17 MR. FRONK: Well, I have no doubt that
18 Mr. Rodenberg called the Magistrate
19 and asked for a delay and we sent
20 a new notice.

21 MR. RODENBERG: Your Honor, I don't know whether
22 that is so. The position I took
23 and have taken, rather I have taken
24 is that I did get a notice saying
25 there was a seven day adjournment

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1 for - an arraignment. But the
2 District Plan provides a hundred
3 and eighty days for the Government
4 to get its business done insofar
5 as prosecuting any particular case
6 is concerned. Now --

7 THE COURT: Six months at this time we
8 are talking about here.

9 MR. RODENBERG: The Plan I read says --

10 MR. FRONK: A hundred and eighty days.

11 MR. RODENBERG: A hundred and eighty days,
12 your Honor.

13 THE COURT: A hundred and eighty days?

14 MR. RODENBERG: Yes, it is.

15 MR. FRONK: That's the old Plan, your Honor.

16 MR. RODENBERG: Now, that does not mean, your
17 Honor, or at least I don't interpret
18 it as being what the Plan intended --

19 THE COURT: Let me go back.

20 MR. RODENBERG: All right.

21 THE COURT: Wasn't the Plan for achieving
22 prompt disposition of criminal cases
23 in effect in this critical period?

24 MR. FRONK: Yes. That's what I would
25 colloquially refer to as the old

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Second Circuit Plan for prompt
disposition.

THE COURT: Isn't that the one that is
controlling?

MR. FRONK: Yes, that's the one controlling
on our filing the Notice of Readiness
and informing us of readiness.

THE COURT: Right. That's six months.

MR. FRONK: No, that's a hundred and eighty
days.

MR. RODENBERG: A hundred and eighty days.

THE COURT: I read paragraph 4 it says,
"In all cases the Government must
be ready for trial within six
months from the date of arrest."

MR. FRONK: I stand corrected, your Honor,
it is six months.

MR. RODENBERG: Even assuming for the moment,
your Honor, that it is indeed six
months, the Government argues to you,
sir, that because one day was taken
up by a hearing before the Magistrate
that that is excludable time. How
can that be excludable time when the
Government is given a hundred and

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1 eighty days to get this type of
2 business done and get on with the
3 work of the trial? Now, the seven
4 day adjournment in arraignment could
5 have had no adverse impact whatso-
6 ever, sir, upon the Government being
7 able to go ahead with its business.
8 Now, also, sir, the Government was
9 given at that time assuming that it
10 was six months then to get its work
11 done, to get its evidence together.
12 Now, certainly, sir, the Government
13 are the planners, the formulators of
14 the Plan, took into account that
15 there would be cases, especially in
16 New York City where there would be
17 scientific testing and they said
18 here six months will do it. You cannot
19 now come in two years later and say
20 give us some more time, because of the
21 fact that it took us until September
22 to get the scientific testing
23 finalized. That is exactly what the--

24 THE COURT:

Let me cite another provision
25 though of that same paragraph 4 and

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1 I assume it is under this provision
2 that Mr. Fronk makes his plea and
3 this is the final sentence, it says,
4 "Otherwise, namely if the Government
5 is not ready and has not primarily
6 requested a continuance that other-
7 wise the Court shall enter an order
8 dismissing the indictment with
9 prejudice unless the Court finds
10 that the Government's neglect is
11 excusable in which event the dis-
12 missal shall not be effective if the
13 Government is ready to proceed to
14 trial within ten days."

15 MR. RODENBERG:

That has no application here,
16 sir.

17 THE COURT:

Well, Mr. Frank did not cite
18 that. I am assuming that when
19 he is talking about exigencies of
20 preparing for this trial and the
21 scientific analyses required that
22 he is trying to bring this within
23 the ambit of excusability. It looks
24 to me obviously that the Government
25 having known that the analyses were

1 needed should have made during the
2 six month period a motion for
3 continuance based upon it.

4 MR. RODENBERG:

Sir, one other argument, and
5 I do not say this to be sarcastic,
6 Mr. Fronk says he is checking the
7 Magistrate's records to see if the
8 Government indicated it was ready
9 for trial. How could the Government
10 be ready for trial at a time that
11 a preliminary hearing was held when
12 nobody knew whether there was even
13 going to be an indictment?

14 THE COURT:

No. He is talking about
15 the arraignment appearance and
16 not the preliminary hearing. He
17 is saying that Mr. Skretny may
18 have on the record before the
19 Magistrate at the time of arraignment
20 which would have been November 25,
21 1975 announced orally that he and
22 the Government were ready to go to
23 trial, that is your point, is it
24 not, Mr. Fronk?

25 MR. FRONK:

That's correct, your Honor.

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1 THE COURT:

Yes.

2 MR. RODENBERG:

3 Your Honor, I cannot believe
4 that the Plan contemplates such loose -
5 that is approval of such loose behavior
6 on the part of the prosecutorial
7 agency. If this, sir, is the case
8 and the Government says it's ready
9 for trial at the time of arraignment
10 we will say the arraignment takes
11 place within a week of an alleged
12 offense for which an individual has
13 been indicted, the mere fact that
14 they say, "we're ready for trial"
15 is not the answer here. They must
16 actually be ready. Now, we know
17 that in cases such as this where
18 time is consumed by forwarding the
19 material to the Federal - to the
20 FBI, that type of thing, that in
21 all likelihood the Government couldn't
22 be ready before September, but that
23 was only ninety days from the date
24 of arrest. I don't think the Govern-
25 ment, sir, should be able to come
in here at this time and say, "Well,

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1 the scientific experiments held us
2 up.", when it's obvious though we
3 have no factual - formal factual
4 testimony here as to this except
5 that Mr. Fronk is making certain
6 claims and I'm making certain claims,
7 but it's obvious that they were
8 through in September. Now, that
9 can't come in within any exception.
10 And, how if the work is completed
11 within a hundred and eighty days
12 can they possibly fall back on that
13 for saying they need more time in-
14 sofar as the notice of readiness
15 to the Court. And what Mr. Fronk
16 has forgotten is the defendant is
17 entitled to some notice here too.
18 I mean merely putting it on a docket
19 sheet or checking the Second Circuit
20 without a showing that I knew about
21 it at the same time or whoever counsel
22 would be knew about it at the same
23 time, I think it's just self-serving
24 conclusion that they were ready. And
25 I think that --

1 THE COURT:

Well, I don't know of any
2 case in searching my own recollection,
3 Mr. Rodenberg, where there has been
4 that requirement that the formal
5 announcement even where the formal
6 announcement has been required, and
7 certainly courts have required it,
8 has been neted to be conveyed to the
9 defense. It certainly is salutary
10 to do so, but I don't know of any
11 situation where that has been a
12 requirement. All the rule said or
13 the Plan was the Government, quote,
14 must be ready for trial, unquote.
15 It does not indicate that they should
16 announce that in writing or anything
17 else. Now, there is a paper they
18 filed on December 10th which says,
19 "The United States of America,
20 plaintiff herein, being ready to
21 proceed to trial in the above
22 entitled action, hereby moves
23 said action for trial and ask this
24 Court to set it down for trial
25 the first convenient date with this

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1 Court calendar following completion
2 of any and all motions." Now, there
3 again, and I know from my own ex-
4 perience that this had been a type
5 of document that was being used by
6 the United States Attorney's Office
7 in and through this period. This
8 does not say the Government now
9 having become ready for trial, there
10 is nothing in there that forecloses
11 the Government from saying that
12 they were not there before ready.
13 However, I go along with you that
14 we can't just spin these things out
15 of thin air, we need to have some-
16 thing tangible to show that the
17 Government was ready. I would think
18 that if there was an announcement
19 on the record before the Magistrate
20 at the time of arraignment, and I
21 gather there was no proceeding before
22 the Magistrate for discovery --

23 MR. RODENBERG:

No, there was not.

24 THE COURT:

-- because discovery was, I
25 understand handled between yourself

1 and the Government on an informal
2 basis. If there was that announcement
3 on the record at that time I would
4 certainly that to be true. Now,
5 it is in my recollection also that
6 the Government was ready for trial,
7 clearly was ready for trial, and
8 announced that to me as of the time
9 we were dealing with the motion to
10 suppress which was submitted, was
11 argued I think February 5, and was
12 submitted February 6, and I am
13 quite clear in my own recollection
14 that the Government was ready to go
15 to trial, obviously could not go to
16 trial until your motion had been
17 disposed of, but the Government never-
18 theless was ready to go to trial.
19 However, with the strictness with
20 which this six months rule was
21 applied and the hundred and eighty
22 day rule is applied, and as you
23 know that the other day they don't
24 even allow the Government the one
25 day beyond the stated period as far as

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1 any transgression, it does not
2 really matter what they said here
3 in connection with the suppression
4 motion. What is critical and may be
5 critical are two things: One, whether
6 the delay in arraignment has any
7 effect on the six months readiness
8 rule and, two, whether in fact
9 on the record someplace in some
10 tangible form the Government announced
11 itself as ready. I don't know if I
12 would go along with the emersion of
13 this particular case in a whole
14 listing of cases where the Government
15 was ready, I don't have to really
16 give that further consideration.
17 But if on the record before the
18 Magistrate it was so announced that
19 would be a different ballgame.

20 MR. FRONK:

Now, your Honor, if I might
21 just - to that last point, the
22 emersion of the case and the number
23 of cases and some sort of report.
24 Mr. Rodenberg has - well, he has
25 either forgotten or he doesn't --

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1 The six months rule was for us to be
2 ready for trial, it wasn't the
3 emergence of a trial or the start of
4 a trial.

5 THE COURT:

That is true.

6 MR. FRONK:

Now it is a funny little rule.
It just means that we've got to state
that we're ready, ostensibly the
Court could then put us on trial.
It's a technical thing.

11 THE COURT:

It comes down in essence and
it has been held in a couple of
cases, that it meant what it said,
mainly the Government must be ready.
The Government could not, for
example, on the day following an
arrest and without having an indict-
ment or without having its
scientific analyses carried out
blithely say to the world, "we are
ready" when in fact it appeared
pretty flatly they were not. The
Government must be ready. It does
not say they must announce it, it
does not say how they express that,

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1 but the Government must be ready.

2 MR. FRONK:

3 I know that it is only fair,
4 and it seems to be a good and proper
5 practice to advise the defense
6 attorney, but the case I cited
7 U.S. v. Pierro, the Court states ,
8 "Although we conclude the Government's
9 failure to inform the defendant of
10 its readiness does not justify
11 the dismissal of charges against
12 him under a motion to dismiss.

13 THE COURT:

14 Well, I go along with that. I
15 find the practice of so advising
16 the defense to be salutary, desirable,
17 but not necessary.

18 MR. RODENBERG:

19 I haven't indicated that I
20 didn't get that notice. I merely
21 made argument on behalf of the
22 defendant that if this Plan wasn't
23 something to be toyed with that
24 certainly the defendant should be
25 notified about it. I get no
26 notices, of course, what the U. S.
27 Attorney is doing insofar as forwarding
28 notices of cases which are ready to

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1 the Second Circuit - the Second
2 Circuit of New York. I - I'm
3 trying to find a way to say it.
4 Your Honor, there could be on that
5 list of cases sent down a case
6 which is aged, might not be ready
7 for trial and still included.

8 THE COURT:

9 I gather even Mr. Fronk would
10 admit that if this case were on a
11 list that went to the Second Circuit
12 that that would not be sufficient
13 but Mr. Fronk is indicating that
14 copies of the same report or announce-
15 ment would have come to this court.
16 Of course, it is this Court being
17 somehow aware that the Government
18 is ready although the statute that
19 the rule - the Plan does not even
20 say that, it just says that the
21 Government must be ready. Now in
22 practicality there must be some
23 indication to the Court that has
24 a responsibility for trying the
25 case that the Government is ready for
trial.

1 MR. FRONK:

I wouldn't contend any more
and I wouldn't - and I know the
argument of putting it in the
sheets with a copy to the Court is
probably the worst type of notice,
I do advance it as some sort of
possible notice. The only thing I
would say finally, your Honor, and
again citing from the Pierro case,
the Second Circuit Plan was never
intended to straight-jacket either
the administration of the courts
or any law enforcement purposes
and it was never intended that some
sort of technicalities would carry
the day.

17 THE COURT:

But you do agree that if there
were six months and one day, the
Government were not ready until
six months and one day, that that
amount of technicality would send
the case down the drain?

23 MR. FRONK:

If we had a case where we
charged with a complaint and not
one shread of business was done for

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1 six months and one day --

2 THE COURT: Well, if in fact the Government
3 was not ready, however, we determine
4 that.

5 MR. FRONK: Right. But I think there's
6 enough periods in here that can fit
7 in the excludable time period and
8 that is what we are arguing, your
9 Honor.

10 MR. RODENBERG: I don't know how a delay in
11 arraignment, your Honor, within a
12 period of one hundred and eighty
13 days, well within that period can
14 be regarded as excludable time unless
15 the Government can show that it had
16 an adverse impact on the Government's
17 planning getting ready for trial,
18 there's no way that I know that this
19 argument can be advanced.

20 MR. FRONK: That's clearly not the standard.

21 MR. RODENBERG: Well, your Honor, we're not
22 playing games.

23 THE COURT: He must have been, he, Mr.
24 Wedalowski, must have been initially
25 arraigned following his arrest on

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1 June 2, there was a complaint filed
2 and he was arraigned on that complaint
3 and they proceeded to a preliminary
4 hearing, then of course, we came
5 into November when the indictment
6 was returned and filed with the
7 Court and he had to be arraigned
8 on the indictment and it is that
9 arraignment that we are talking
10 about.

11 MR. FRONK:

Yes.

12 THE COURT:

13 Now if that arraignment or
14 delay in arraignment would have any
15 effect on the six months rule for
16 the Government being ready, that
17 six months would, in any event,
18 in all events start marking off
19 from the date of the filing of
20 an indictment or the filing of
21 an information. Now the rule
22 would not be concerned with date
23 of arrest or date of complaint
24 which it is. So I take it that
25 the mere fact that the rule does
start the running of the six months

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1 period from the date of arrest
2 in this case means to me that the
3 delay or whatever happened following
4 the indictment so far as the delay
5 of arraignment is meaningless so
6 far as the six months period
7 requiring the Government to be
8 ready. Now we seem to me to come
9 down strictly to the fact or non-
10 fact whether the Government was
11 ready on or prior to December 3,
12 1975 because I do grant the Govern-
13 ment one day tolling for the pro-
14 ceeding that was involved in the
15 preliminary hearing in that time
16 span. Now, the Government then
17 must somehow give me a showing
18 that it was ready.

19 MR. FRONK:

Well, your Honor --

20 THE COURT:

21 One if there was something
22 on the record before the Magistrate
23 on November 25, 1975 I would deem
24 that sufficient. If it is included
25 in the list of cases in which the
Government was ready and a copy

1 went to this Court prior to
2 December 3, 1975 I would give
3 consideration to it, I would look
4 at it and see how much of an
5 indication there really is that
6 the Government was ready. Now,
7 failing that, and I don't know
8 if this is all a feasible operation,
9 it is possible to have a hearing
10 now as to whether the Government
11 was ready, but I can't really in
12 my mind organize that so far as
13 what it would comprise and what
14 we would show and how I from any
15 such hearing would make any such
16 determination. Mr. Skretny, for
17 example, comes into the Courtroom,
18 takes the witness stand and says,
19 "Your Honor, I was handling this
20 case through this period and it
21 was my responsibility, the Govern-
22 ment was ready.", do I accept
23 that on its face?

24 MR. FRONK:

 Well, your Honor, it's getting
25 so complex. I think I could come up

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1 with cases from the Second Circuit
2 to show your Honor which states
3 the date of adjournment of an
4 arraignment as absolutely excludable.

5 THE COURT: You have cited two cases,
6 Masullo and P.

7 MR. FRONK: But that is the pure
8 notice requirements, what type of
9 notice is needed and the fact
10 it has to go to the Court. I'm saying
11 that --

12 THE COURT: In McDonough you said --

13 MR. FRONK: And the McDonough case also
14 set that proposition forward. I
15 merely advance this to your Honor,
16 this thing is an important case,
17 it's a difficult and extremely
18 complex motion. Perhaps, we
19 should take the time, a couple of
20 days, a week, or whatever and get
21 a brief in on it and then have
22 affidavits attached to my brief
23 if I am going to have someone
24 swear who said he was ready on
25 the record in the Magistrate's

Transcript of oral argument, findings and order from
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1 Court and then you would have a
2 complete set of law from either
3 side on which to decide this
4 because it's going to turn on a
5 couple of excludable periods and
6 when and if and how we stated we
7 were ready.

8 THE COURT: Now you indicated you are trying
9 to find out from the Magistrate
10 what happened down there. What
11 is the difficulty there?

12 MR. FRONK: Well, nothing is ever trans-
13 cribed which takes place down there.

14 THE COURT: It is all recorded.

15 MR. FRONK: Well, yes, but they don't have
16 those records from back in 1975
17 available in your office right
18 there. I guess there is a storage
19 room that the clerk set aside for
20 them.

21 THE COURT: They are here in the building
22 are they not?

23 MR. FRONK: I asked the Magistrate's office
24 if they could look in their records
25 and listen to their recording to see

1 if there was any indication and I
2 said I would need it right away.
3 Now, I haven't been back to them
4 because I came straight here. I'm
5 only suggesting that the matter is
6 complex enough so that perhaps
7 we should spend some time on it.
8 I know a jury is drawn, it's not
9 sworn though yet.

10 THE COURT: I know, but I am ready to go
11 to trial.

12 MR. FRONK: Well, we may be back on this,
13 that's the problem.

14 THE COURT: Does the Magistrate know that
15 we are at this posture?

16 MR. FRONK: I can't say that he does. I
17 assume he does, your Honor.

18 Your Honor, I just don't think
19 we should push into a trial if
20 we're only going to go to the
21 Second Circuit and get the darn thing
22 back on our heads at some time.

23 THE COURT: The Magistrate's records
24 should be available and would show
25 what you say it might show, if on

Transcript of oral argument, findings and order from
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1 the record that Mr. Skretny or
2 someone on behalf of the U. S.
3 Attorney's Office said the Govern-
4 ment is now ready for trial, I
5 think that would be sufficient.

6 MR. FRONK: May I ask for fifteen minutes
7 to go down and see if I can climb
8 through their tapes and records
9 and find out something?

10 THE COURT: Well, yes. The thing is I
11 want to -- you should have the
12 cooperation of the Magistrate's
13 Office in this regard.

14 MR. FRONK: I'm sure we will, your Honor.
15 It's just something that just --

16 THE COURT: I don't think you should be
17 pawing through it. In fact, if I
18 were the Magistrate, I would not
19 let you paw through it.

20 MR. FRONK: No. I would just go down there
21 and sort of help them out and I
22 asked Mr. Skretny to go down because
23 he was in charge of the thing then.

24 THE COURT: Has he been down there working
25 on it this morning?

1 MR. FRONK:

I think he has been in the
2 Grand Jury. I'll have to go down
3 and get him. It's just a matter
4 of things happening so fast, your
5 Honor.

6 THE COURT:

This is a matter of importance
7 or non-importance so far as the
8 Government is concerned and I
9 think it behooves the Government
10 to check out that one thing very
11 quickly which it might provide an
12 answer and then if it does not,
13 then I have to decide what next
14 to do.

15 MR. FRONK:

Very well.

16 MR. RODENBERG:

Your Honor, I will wait, of
17 course, until Mr. Fronk comes back,
18 but it would be my intention --

19 THE COURT:

You may go down with him,
20 if you want to, Mr. Rodenberg.

21 MR. RODENBERG:

I am concerned that your
22 Honor has indicated that that one
23 day spent during the conduct of
24 a preliminary hearing is for some
25 reason excludable. This is what

1 the hundred and eighty days was
2 for. But I'll wait.

3 THE COURT:

4 It says the period of delay
5 while proceedings concerning the
6 defendant are pending. Now, granted
7 in the example set forth it deals
8 with determination of competency,
9 pre-trial motions, interlocutory
10 appeal, trial of other charges,
11 and the period during which the
12 matters are under consideration.
13 It does not say preliminary hearing.
14 Of course, sometimes you have
15 preliminary hearings, sometimes
16 you do not, more often you do not.
17 Actually as far as we are concerned
18 here, that one day is not critical
19 unless there is nothing on the
20 record before the Magistrate on
21 November 25, saying the Government
22 is ready, and unless the delay in
23 arraignment has any pertinency.
24 We only must have nothing on the
25 record before the Magistrate and
find that the seven days is of tolling

Transcript of oral argument, findings and order from
July 25, 1977 and July 27, 1977.

1 before the one day is important
2 and then, of course, it is highly
3 critical.

4 We will take a break.

5 Tell the jury that they can
6 go out and wander around and come
7 back at eleven o'clock.

8
9 (ADJOURNMENT FROM 10:10 A.M. to 11:12 A.M.)
10

11 MR. FRONK: Your Honor, during the interim
12 I have had a chance to listen to
13 the tapes in the Magistrate's Court
14 of the proceedings held on November
15 25, 1975 and on December 9, 1975.
16 I can say --

17 THE COURT: What happened December 9?

18 MR. FRONK: Well, if I might, I will
19 explain. At the November 25th
20 arraignment, no one from the Govern-
21 ment indicated anything on the
22 record of a readiness for trial.
23 Mr. Rodenberg was not there, Mr.
24 Richard Brownstein appeared for
25 him. A discovery schedule was set

1 for the filing of motions, and at
2 the request of Mr. Brownstein, he
3 requested until December 8th to
4 file motions and we were given to
5 the 12th to respond with the 16th
6 of December for argument. No
7 motions for discovery were, in
8 fact, filed, and the return date
9 thereupon became December 9th. The
10 Magistrate indicated no motions
11 having been received, he would
12 contact Mr. Rodenberg orally and
13 immediately send the case up to
14 your Honor. I checked the December
15 9th appearance to see if there might
16 have been some notification on the
17 record by the Assistant on that
18 date even though it would only be
19 one more day and there was none.
20 I further made inquiries in our
21 docket room concerning the possi-
22 bility that this case might have
23 been on a list sent to your Honor
24 in the Second Circuit and I cannot
25 confirm that in any way since it

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1 appears that our records only go
2 back two years and they are des-
3 troyed so I can't put that forward
4 to you now with any substance.

5 THE COURT:

Now, in the United States
6 versus Oliver which concerned the
7 case that was decided in June of
8 1975, this was a case handled by
9 Judge Curtin, there was a reference
10 to a particular Form 74 --

11 MR. FRONK:

That's correct.

12 THE COURT:

-- which might be some such
13 report of cases showing the
14 Government's readiness or maybe
15 non-readiness. This apparently
16 would be a form that is reported,
17 sent to the Second Circuit Court
18 of Appeals with a copy to the Chief
19 Judge here. I have checked among
20 my records, and my secretary's
21 recollection, and my own recollection,
22 and I have not been aware since the
23 time I have been a Judge of any
24 such report coming to me. Now, of
25 course, prior to July 1, 1975 all

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1 criminal cases before the Buffalo
2 end of the Western District of
3 New York were assigned and being
4 handled by Judge Curtin because
5 I had become Judge January 10, 1975
6 after having been the United States
7 Attorney since July of 1972, and
8 it was determined on a basis of
9 practicality that as to all cases
10 or most of the cases that would
11 have found themselves in infor-
12 mations or indictments filed in
13 those early months would have found
14 me involved as U. S. Attorney in
15 prosecution, investigation or
16 presentment to the Grand Jury or
17 some such, and I would have had
18 to refuse myself. Beginning on
19 July 1, 1975, we entered into the
20 arrangement that we now have, that
21 cases, criminal cases filed here
22 in Buffalo are allotted between Judge
23 Curtin and myself on the basis of
24 chance so that there can be no
25 prior knowledge or determination

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1 as to which Judge is going to get
2 a particular case, and I thereafter
3 started getting them. Now this
4 case was assigned to me after the
5 indictment was filed. If it
6 were noted on any form such as
7 Form 74 that the case was ready
8 and that notice went to the Second
9 Circuit with a copy to the Chief
10 Judge that in no way informed me
11 as recognizant trial judge that the
12 case was ready and it would be my
13 determination that there must be
14 some indication to the trial judge
15 whereas here we have individual
16 court calendars that a particular
17 case is ready for trial, and I have
18 had an informal inquiry made of
19 Judge Curtin's secretary, of course,
20 Judge Curtin is out of the District
21 at this time, his secretary tells
22 my clerk Mr. Bono that she has no
23 knowledge of or copies of any forms
24 74 or any such listing. We have
25 attempted to check the matter with

Transcript of oral argument, findings and order from
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1 Miss Gloria Cezerwick who now is
2 the Criminal Docket Clerk, Mr.
3 Walsh?

4 CLERK: Yes, your Honor.

5 THE COURT: -- in the United States Clerk's
6 Office and she has no such knowledge
7 of anything. I suggested that
8 she telephone Helen Moylan who
9 is the Cognizant Docket person in
10 the U. S. Attorney's Office to
11 find out what Mrs. Moylan might
12 know about it, and Mrs. Moylan is
13 on vacation.

14 MR. FRONK: Correct.

15 THE COURT: Now, we consulted in that
16 manner with her assistant, Mrs.
17 Thomasula and Mrs. Thomasula knows
18 nothing about anything like this.
19 So as far as any listing of cases
20 which were ready we have nothing
21 to show me in that regard. The
22 only thing we have is some possible
23 question and I think it is not much
24 of a question, but I leave it to
25 you, is whether in this time of non-

1 arraignment, with or without the
2 delay, whether this equated to
3 unavailability of the defendant.
4 My reading of the cases it seems
5 not to be that a delay of arraignment
6 or non-arraignment, whether
7 that be marked from a time of
8 notice or from a time of initial
9 arraignment prior to a postponed
10 arraignment date that that in and
11 of itself has anything to do with
12 this six months requirement for the
13 Government being ready unless it
14 falls within I believe it is
15 provision 5 (d) of the Plan of
16 this Court then in effect whether
17 it amounts to unavailability of
18 the defendant. Now, I am frank to
19 say that I do - I would deem it
20 to be to amount to unavailability
21 of the defendant, if a postponement
22 or the non-arraignment was brought
23 about through unavailability of
24 defendant's counsel, and if they
25 delay the seven days in this instance

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1 were brought about because of any
2 unavailability through various
3 reasons of defense counsel, that in
4 my mind would amount to unavaila-
5 bility of the defendant and the
6 Government would be entitled to
7 tolling for that period. That is
8 where I am.

9 MR. FRONK:

 Well, I know our records
10 indicate that a phone call was
11 placed to our office and to Mrs.
12 Moylan who prepares the notices
13 of arraignments in conjunction with
14 the Magistrate's Office indicating
15 that a one week adjournment was
16 requested by the defendant through
17 his counsel and the Clerk's records
18 also so indicate. I just have no
19 personal knowledge not having
20 handled the case at that time
21 whether that was because Mr.
22 Rodenberg was unavailable, because
23 the defendant was unavailable or
24 what reasons were given, I know
25 another counsel did appear on the

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1 25th, but I can't give you any
2 reasons in the meantime.

3 THE COURT:

4 Well, evidently what happened
5 on the 25th has nothing to do with
6 what happened earlier, I assume,
7 although of course, there could
8 be a tie-in. It is possible that
9 Mr. Rodenberg being defendant's
10 counsel was unavailable and maybe
11 his unavailability continued into
12 November 25, and he at that point,
13 namely, on a later date arranged
14 to have Mr. Brownstein appear in
15 his own stead, that might have
16 some bearing on his unavailability,
17 Mr. Rodenberg's, or a counsel's
18 unavailability, I don't know.

19 MR. FRONK:

20 One of the cases I just cited,
21 your Honor, I don't know whether it
22 is Oliver or Flores, appeared to
23 deal with what unavailable means.

24 THE COURT:

25 Yes, I have read Flores and
it is Flores that deals with it.

MR. FRONK:

In that case, I think it was
a key witness who hadn't decided

1 to cooperate and they referred to
2 an earlier Second Circuit case
3 for a definition of unavailability.

4 THE COURT: And they flatly said that the
5 unavailability of a witness or
6 the unwillingness of a witness to
7 testify if the Government wanted
8 him to testify would have no
9 bearing at all upon the unavailability,
10 I am referring to the Flores case.

11 MR. FRONK: I believe they cited U. S. v.
12 Rollins at 487 F.2d 409, a Second
13 Circuit case on a definition of
14 unavailability.

15 THE COURT: The Plan, itself, it seems
16 to me, is fairly definitive of
17 the term, and the term itself is
18 not that complex or obtuse that it
19 really needs much special definition.
20 Unavailability equals unavailability.
21 In my mind, the only extension of
22 that that I make and I have no
23 trouble in reaching this deter-
24 mination is that a defendant who
25 himself is available, easily

Transcript of oral argument, findings and order from
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1 located, would be unavailable
2 for purposes of the Rule if in
3 fact his counsel were unavailable.
4 In other words, a defendant certainly
5 has a right to be represented by
6 counsel and if counsel were not at
7 a particular time available that
8 would equate to unavailability
9 of the defendant, but I know nothing
10 about the unavailability of counsel
11 either.

12 MR. FRONK:

There is nothing I can say
13 on that point, your Honor. I am
14 just not aware of any extension
15 of that excludable time period
16 to that area and I don't actually
17 know why it was granted - what was
18 requested.

19 THE COURT:

And you are not prepared to
20 go ahead and make any showing then?

21 MR. FRONK:

I just don't have any facts
22 on it. I just know it was requested
23 by the defense attorney, and with
24 a concurrence of our office and
25 the Magistrate's Office --

1 THE COURT: And Mr. Skretny was the
2 Assistant United States Attorney
3 in charge of the case at that time
4 and I take it you have plumbed his
5 recollection also?

6 MR. FRONK: No, I have not. I've only
7 taken -- I had never considered
8 defense counsel's request for an
9 adjournment as an exclusion under
10 the unavailability theory. No,
11 I have never seen anything supporting
12 that view. I had merely taken it
13 as excludable time period under
14 5 (b).

15 THE COURT: I would say it came about
16 because of defense counsel's
17 unavailability that it well may
18 amount to defendant's unavailability
19 to give the Government the benefit
20 of the seven days. Absent that
21 I would say the Government has not
22 shown itself to be ready within
23 the six months' requirement.

24 MR. FRONK: Well, we would respectfully
25 except from that citing 5 (B) as

1 one which we think would certainly
2 cover it. I just can't comment,
3 I have no facts to put forth to
4 the Court as to why Mr. Rodenberg
5 or Mr. Wedalowski couldn't come
6 forward on that date.

7 THE COURT: Mr. Rodenberg.

8 MR. RODENBERG: Yes, sir.

9 THE COURT: Do you have any comments?

10 MR. RODENBERG: I think your Honor knows me
11 well enough to know that if I had
12 any recollection of the incident
13 that I would come forward and tell
14 you. I have no recollection, sir.
15 I know that I received a notice
16 because I looked through my file
17 recently, but this is all I recall
18 of it. I have no recollection.
19 Since I'm representing Mr. Wedalowski --

20 THE COURT: I have no alternative but to
21 pay attention to the express
22 language of the Plan as it was in
23 effect and, of course, the Courts
24 have made it clear that although
25 there are various periods which can

1 be tolled and excluded from the
2 running of the time period for
3 various reasons that once we have
4 culled out all that type of time
5 period, we come down to a very hard
6 and strict time rule that the
7 Government must be ready by the
8 end of the six months period,
9 and six months and one day is not
10 enough, and in this case, six
11 months and seven days is not
12 enough. Mr. Rodenberg contends
13 that my interpretation of the
14 preliminary hearing days as being
15 a one day that should be excluded
16 is wrong. I think I am right.
17 But that is not pertinent here
18 because again, we come down to
19 a question of six months plus seven
20 days or six months plus eight days,
21 however, that decision as to one
22 day goes. So the consequence, I
23 will grant the motion of the
24 defendant for dismissal of the
25 indictment against Mr. Wedalowski

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1 by reason of the Government not
2 being ready within the six month
3 period following Mr. Wedalowski's
4 arrest as required by the Plan
5 then in effect. I think the
6 findings are clear on the record
7 throughout our discussion.

8 MR. FRONK:

We respectfully except for
9 the reasons set forth in our argu-
10 ment.

11 THE COURT:

All right.

12 Bring up the jury.

13
14 (JURY PRESENT, 11:30 A.M.)
15

16 THE COURT:

All this vacuum in the
17 courtroom, ladies and gentlemen,
18 means you don't have to take your
19 seats, just file in.

20 Now what I had been concerned
21 with, ladies and gentlemen, in this
22 case against Mr. Wedalowski both
23 yesterday afternoon and this morning
24 up to this point has been a motion
25 that was made by Mr. Wedalowski's

1 attorney for a dismissal of the
2 case because of a certain non-
3 compliance by the Government with
4 a requirement that the Government be
5 ready for trial within a certain
6 stated period after Mr. Wedalowski
7 had been arrested, and it has been
8 a very technical problem that I
9 have had and have been working with
10 the attorneys on, and it has been
11 my determination that the Government
12 failed to meet that requirement, and
13 although the Government at the
14 worst was probably inadvertent in
15 it and did not do this with any
16 malice toward the defendant nor
17 was the defendant prejudiced in
18 any way by this delay. Nevertheless,
19 the rule itself is very clear in
20 detail that once the Government
21 does not adhere to that readiness
22 rule that the case must be dismissed.
23 Consequently I had granted the
24 motion to dismiss. The case is over
25 as far as you are concerned. The

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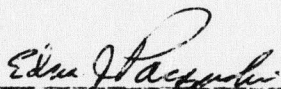
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1 Government may or may not take
2 an appeal on the case. The higher
3 Courts may reach a contrary
4 decision. If they do it will come
5 back down and at some future time
6 I will be drawing another jury and
7 we will try the case. Now you
8 are dismissed, and you are excused,
9 and we will let you know when
10 next to come in. Thank you very
11 much.

12
13 (JURY DISMISSED, 11:35 A.M.)

14 * * * * *

15 I CERTIFY that the foregoing
16 is a complete and accurate
17 transcription of my stenotype
18 notes taken herein.

19 
EDNA J. PACZYNSKI
20 OFFICIAL REPORTER
USDC, WDNY
21
22
23
24
25

**Official docket records in United States
v. Wedalowski CR 75-249.**

U.S. DISTRICT COURT - CRIMINAL DIVISION

Felony ☒ JUDGE/Assigned Trial
Magistrate 0906

Offense ☐ 209 1 Disp./Sentence

Defendant ☐ District Office

U.S. vs. WEDALOWSKI, James Francis

Date No. 1211 75 249

No. 1 of Defendants

U.S. CODE SECTION: 18-2113(a) & 2

ARGES Entered an FDIC-Insured Bank with intent to commit a felony

U.S. Attorney or Asst. William Skretny

Defense: ☐ CJA ☒ Ret: ☐ Waived, ☐ Self, ☐ None, ☐ Other, ☐ PD, ☐ CO

Salten Rodenberg

AGR. SE NO.

☐ Personal Recog.
☒ Denied ☒ Unsecured Bond
☐ Conditional Release
Set (000) \$ 5
6/2/75
date ☐ 10% Deposit
☐ Surety Bond
☐ Collateral
☐ Bail Not Made
☐ 3rd Party Custody
☐ Bail Status Changed
☐ PSA
(See Docket)

ARREST 6/2/75

INDICTMENT ☒ Information ☐ 11/12/75

ARRAIGNMENT 11/25/75

TRIAL Trial Set For 7/26/77

SENTENCE

Disposition

☐ Convicted ☐ On All Charges
☐ Acquitted ☐ On Lesser Offenses
☐ Dismissed ☐ WOP: ☐ ☐ Nollo'd/Discontinued*

Search Warrant	Issued	DATE	INITIAL/No.	INITIAL APPEARANCE	INITIAL/No.	OUTCOME
Summons	Issued			PRELIMINARY EXAMINATION OR REMOVAL HEARING		☐ Dismissed ☐ Held for District CJ ☐ Held to Answer to U. S. District Court AT:
Arrest Warrant	Served			☐ Waived ☐ Not Waived ☐ Intervening Indictment		
COMPLAINT				Tape No.	INITIAL/No.	Magistrate's Initials
OFFENSE (Is Complaint)						

Show last names and suffix numbers of other defendants on same indictment/information

V. Excludable Delay

DATE	PROCEEDINGS	(a)	(b)	(c)	(d)
6/13/75	Filed Magistrate's docket, complaint, with affidavit, & \$5,000 Recog. bond				
7/3/75	Filed cy. of transcript of preliminary hearing before Mag. Maxwell on 6/10/75				
11/18/75	Arraignment has been adjourned to 11/25/75, at req. of def. counsel.				
11/25/75	Proceedings before the Magistrate - Deft. pled not guilty; Motion to be filed by 12/8/75; Govt. is to respond by 12/12/75 and argument is scheduled 12/16/75; Deft. continued on \$5,000 recog. bond as previously set on 6/2/75 by Magistrate.				
12/9/75	Proceedings before the Magistrate - No appearance for the defendant				
12/10/75	Filed Govt's motion to move action for trial				
1/19/76	Filed Deft.'s notice of motion for an order of suppression property seized during the execution of a certain search warrant, etc., ret. 1/26/75				
1/26/76	Adj. with approval of the court to 2-2-76				

(OVER)

OPPOSITE THE APPLICABLE DOCKET ENTRIES IN SECTION IV SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE

Rep 106

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
2/6/76	Filed Govt's response to def't's motion to suppress evidence				
2/9/76	Argument on motion to suppress, decision reserved. expiration date 30 days	3	2/9/76 3/9/76	G	30
6/5/76	Filed Search warrant - Ford Sedan - 370 EDT				
10/12/76	Filed subpoena (D.T.) - Bureau of Motor Vehicles, served - 10/4/76				
1977					
May 18	Filed Memorandum & Ord. dtd 5/17/77 - def't's motion to suppress is denied without prejudice and his motion for hearing is granted. ELFIN, J.				
May 31	Set date for hearing: Adj. to 6/6/77 as def't's attorney away for medical exam.				
June 6	Set date for hearing: Court sched. hearing for 6/20/77.				
June 20	Hearing commenced at 3:35 pm, adjourned at 5:15 pm. Witnesses: Richard Dennis Davidson, Robert Shaw Ct. directd Atty. Rodenberg to advise the Ct. whether additional witnesses to be subpoenaed by 6/23/77.	3	6/20/77 6/20/77	E	1
July 7	Filed Findings of Fact and Order dtd 7/6/77- def't's motion to suppress the evidence obtained upon the execution of the warrant hereby is denied. ELFIN, J.				
July 11	Filed Notice of Motion and Affidavit of def't. for an order dismissing the indictment in all respects, returnable 7/25/77.				
July 11	Court set trial date of 7/26/77.				

AFFIDAVIT OF SERVICE BY MAIL

RE: U.S.A.

vs

James F. Wedalowski

State of New York)
County of Genesee) ss.:
City of Batavia)

No. 77-1406

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
Company, Batavia, New York.

On the 11th day of November, 19 77
I mailed copies of a printed Brief & App. in
the above case, in a sealed, postpaid wrapper, to:

10 copies to: A. Daniel Fusaro, Clerk
U.S. Court of Appeals, Second Circuit
U.S. Courthouse, Foley Square
New York, New York 10007

2 copies to: Salten Rodenberg, Esq.
400 Walbridge Building
Buffalo, New York 14202

at the First Class Post Office in Batavia, New
York. The package was mailed Special Delivery at
about 4:00 P.M. on said date at the request of:

Richard J. Arcara, United States Attorney, Att: James A. Fronk, Asst.
U.S. Attorney

502 U.S. Courthouse, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

11th day of November, 19 77

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1979

